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Report on

Peremptory Challenges in Civil Jury Trials

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON PEREMPTORY CHALLENGES IN CIVIL JURY TRIALS

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The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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To the Honourable Brian Smith, Q.C.,
Attorney General of the Province of British Columbia

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
PEREMPTORY CHALLENGES IN CIVIL JURY TRIALS

Parties to civil litigation may exercise certain powers for the selection of the jury that will hear the matters in dispute. Jurors should be fair-minded and impartial. If a party is aware that a prospective juror is biased or otherwise unqualified, he may challenge for cause.

In addition to challenges for cause, litigants are also entitled to exercise a limited number of challenges without reasons. These are referred to as peremptory challenges.

Procedural problems have arisen concerning peremptory challenges. In this Report we make recommendations to resolve those problems.

CHAPTER I INTRODUCTION

A. Peremptory Challenges

In a civil action to be heard by judge and jury, plaintiff and defendant may exercise certain powers to determine whether a prospective juror may be included in the jury. Either may challenge a prospective juror for cause. If a person is not qualified under the *Jury Act*,[1] or is personally interested in the case or otherwise biased, he should not be part of the jury. Provided a party is aware of a cause, he may challenge any prospective juror on that basis.

In many cases, however, parties will not have that information. Consequently, in addition to challenges for cause (which are numerically unlimited) each party may exercise four peremptory challenges. A peremptory challenge is merely the right of a litigant to exclude, without giving reasons, a person from sitting on the jury.

The right to make a peremptory challenge is provided by section 18 of the *Jury Act*. Peremptory challenges certainly do not present the most pressing of problems arising from jury use. Nevertheless, various problems with respect to peremptory challenges continue to arise. For example, if there are two defendants, may they each exercise four peremptory challenges, or must they share those challenges? In what order should challenges be exercised, as between plaintiff and defendant, and as between several plaintiffs and several defendants? Is a third party to the action entitled to exercise peremptory challenges? These issues are either not resolved by, or not addressed in, the *Jury Act* and consequently, we are informed, lead to procedural arguments each time they arise, contributing to delays in the administration of civil justice. In this Report we make recommendations to clarify litigants' rights to peremptory challenges.

B. The Working Paper

The Working Paper which preceded this Report was given wide circulation among judges, lawyers and sheriffs, and generated a number of useful responses. In general, the comments we received supported our tentative proposals. Those comments which were critical tended to centre not on questions of entitlement to peremptory challenges, the subject of the Working

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[1] *Jury Act*, R.S.B.C. 1979, c. 216

Disqualification

3 (1) A person is disqualified from serving as a juror who is

(a) not a Canadian citizen;
(b) not resident in the Province;
(c) under the age of majority;
(d) a member or officer of the Parliament of Canada or of the Privy Council of Canada;
(e) a member or officer of the Legislature or of the Executive Council;
(f) a judge, justice or court referee;
(g) an employee of the Department of Justice or of the Solicitor General of Canada;
(h) an employee of the Ministry of Attorney General of the Province;
(i) a barrister or solicitor;
(j) a court official;
(k) a sheriff or sheriff's officer;
(l) a peace officer
(m) a warden, correctional officer or person employed in a penitentiary, prison or correctional institution;
(n) blind, deaf or has a mental or physical infirmity incompatible with the discharge of the duties of a juror;
(o) a person convicted within the previous 5 years of an offence for which the punishment could be a fine of more than $2,000 or imprisonment for one year or more, unless he has been pardoned; or
(p) under a charge for an offence for which the punishment could be a fine of more than $2,000 or imprisonment for one year or more.

(2) An officer or person regularly employed in the collection, management or accounting of revenue under the *Revenue Act*, or a person registered under the *Chiropractors Act*, *Dentists Act* or *Naturopaths Act* is exempt, if he so desires, from serving on a jury.

Paper, but the utility of the practice itself. There was some agreement that more information about prospective jurors should be made available to litigants so that peremptory challenges could be used more effectively. The responses are discussed in greater detail in Chapters III and IV.

A. Generally

At common law, peremptory challenges were available to an accused in a criminal proceeding respecting a felony.[1] There was no right, however, to challenge a prospective member of a jury peremptorily and without cause in a civil proceeding.[2]

In an 1854 English case, *Creed* v. *Fisher*,[3] a churchwarden brought an action for assault and battery against a clergyman. The trial judge refused to allow the defendant clergyman to exercise a peremptory challenge against one of the jurymen. The defendant appealed from that decision. It was held that parties to a civil action had no right to challenge a juror peremptorily. It was said:[4]

> . . . if peremptory challenges were allowed, it would be impossible to attain a special jury at all in some counties, where the number of special jurymen is exceedingly small.

A special jury was composed of persons who at one time were considered to hold a superior station in society, including esquires, bankers and merchants, all of whom supposedly comprised the wisest and best of a community's residents.[5] Even if that objection to the use of peremptory challenges in civil proceedings was valid in the 19th Century, it no longer holds true since there are a great number of people today who meet the qualifications to be special jurors. In any event, special juries were abolished in British Columbia in 1970.[6]

No other explanation was put forward in *Creed* v. *Fisher* for refusing civil litigants the right to challenge peremptorily. Indeed, it was observed that, in practice, as a matter of courtesy but not of right, it was usual to allow peremptory challenges in civil cases and misdemeanours.

In 1876, legislation was enacted in British Columbia which permitted litigants in civil jury proceedings to exercise peremptory challenges.[7] That legislation continued virtually unchanged into the 1960 revision of the British Columbia statutes. Section 50 of the Jury Act[8] in the 1960 revision provided as follows:

> On the trial by jury of any action or cause or issue of fact, and upon every assessment or inquiry of damages, each party, the plaintiff or plaintiffs on one side and the defendant or defendants on the other, may on each side challenge peremptorily, without assigning any cause, any four of the jurors drawn to serve on the trial of the action, cause, or issue, or on the assessment or inquiry of damages.

That provision was revised in 1970[9] to read:

> Eight jurymen shall be sworn to give their verdict in the proceeding which is brought before them in the court, and each of the parties is entitled to challenge for cause any of the jurors, and to challenge peremptorily not more than four jurors.

---

[1] The ability to challenge peremptorily was confined to felonies. At one time all felonies were capital. A reasonable assumption is that the capital nature of the offence promoted the creation of peremptory challenges. An accused was entitled at common law to 35 peremptory challenges (any number under three juries). By statute, the punishments for many felonies were changed so that they were no longer subject to capital punishment. In *Gray* v. *Reg.*, (1844) 11 Cl. & Fin. 427, 8 E.R. 1164, it was resolved that even though the challenge was no longer *in favorem vitae*, a person accused of a felony was entitled to challenge peremptorily.

[2] (1854) 9 Ex. 472, 156 E.R. 202.

[3] *Ibid.*

[4] *Ibid.*, at 202.

[5] *Jowitt's Dictionary of English Law* (2d ed.), 1680; *Shaw* v. *McDonald*, [1921] 1 W.W.R. 498, 56 D.L.R. 354 (B.C.C.A.); *see also The Juries Act*, 1870, 33 & 34 Vict., c. 77, s. 6.

[6] S.B.C. 1970, c. 15, s. 21.

[7] *Jury Act*, S.B.C. 1876, c. 23.

[8] R.S.B.C. 1960, c. 202.

[9] *Jury Act*, S.B.C. 1970, c. 15, s. 19.

In 1972, that section was again amended[10] and it remains in its amended form. Section 18 of the current *Jury Act*[11] provides as follows:

> **Number of jurymen and challenges**
> **18.** Eight jurymen shall be sworn to give their verdict in the proceeding which is brought before them in the court and each of the parties is entitled to challenge for cause any of the jurors, and each party, the plaintiff or plaintiffs on one side, and the defendant or defendants on the other, is entitled to challenge peremptorily not more than 4 jurors.

B. What does Section 18 of the *Jury Act* Mean?

1. Multiple Plaintiffs or Defendants

Under section 18, it is unclear whether each party to an action is entitled to exercise four peremptory challenges, or whether, no matter how many plaintiffs or defendants, each group or side is limited to a total of four peremptory challenges. Our research has failed to disclose any British Columbia case authority on section 18 of the present *Jury Act* or any of its forerunners.

Some guidance is to be found in Ontario case law. In *Livingstone* v. *Star Printing & Publishing Co. of Toronto Ltd.*,[12] the Ontario Court of Appeal considered the meaning of a section similar to section 18 of our *Jury Act*. The Ontario section read as follows:[13]

> In any cause, the plaintiff or plaintiffs, on one side, and the defendant or defendants, on the other, may challenge peremptorily any four of the jurors drawn to serve on the trial.

In *Livingstone*, the trial judge allowed two co-defendants four peremptory challenges each. The Ontario Court of Appeal held that the legislation permitted only four peremptory challenges to each side.[14]

Two Saskatchewan cases have dealt with legislation similar to the British Columbia provision in the 1970 amendments, before its revision in 1972. The Saskatchewan legislation read as follows:[15]

> Each party to the action shall have and may exercise the right to four peremptory challenges.

In *McKay (McKay Estate)* v. *Gilchrist*,[16] the Saskatchewan Court of Appeal held that that section entitled each party to four peremptory challenges. The same decision was reached in *Bozak* v. *R.M. of Eagle Creek No. 376*.[17]

The revision of the 1970 *Jury Act* in 1972 suggests a legislative conclusion that peremptory challenges should be limited to four to each side. Nevertheless, the language used in the section does not clearly indicate what the Legislature intended.

Notwithstanding the absence of reported cases on these issues, it is our understanding that they arise frequently and are determined on an *ad hoc* basis. It is also our understanding that judges do not approach these problems consistently. There have been cases in which the trial judge has permitted parties to make four challenges each, and cases where co-plaintiffs and co-defendants have been required to share four peremptory challenges.[18]

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[10] *Jury (Amendment) Act*, S.B.C. 1972, c. 30, s. 1.

[11] R.S.B.C. 1979, c. 216.

[12] (1925) 28 O.W.N. 177.

[13] *Jurors Act*, R.S.O. 1914, c. 64, s. 75.

[14] *See also Empey* v. *Carscallen*, (1894) 24 O.R. 658 (C.L.D.); *Gay Co. Ltd.* v. *Trick*, (1926) 60 O.L.R. 8, [1927] 1 D.L.R. 1091 (C.A.).

[15] R.S.S. 1953, c. 72, s. 28.

[16] (1962) 40 W.W.R. 22.

[17] (1965) 52 W.W.R. 472 (Sask. C.A.), *aff'd* (1967) 60 W.W.R. 764 (S.C.C.).

[18] Fraser and Horn, *The Conduct of Civil Litigation*, 1762–1764, n. 55.

2. Third Parties

A third party's entitlement to peremptory challenges is not clear. The position of a third party, with respect to the litigant that issues the third party notice, may be identical to that of a defendant to a plaintiff.[19] In such a case, one would expect that a third party should be entitled to exercise four peremptory challenges. Rights to challenge peremptorily are created by statute. At common law, no right to peremptory challenges existed. It would appear, therefore, that because section 18 does not include or refer to third parties, they may not challenge a prospective juror peremptorily,[20] even if they are adverse in interest to the party who joined them to the action.

On the other hand, the issues arising between one litigant and a third party he has joined may involve uncontentious matters respecting, for example, indemnification. Technically, the positions of a third party and the litigant that has joined him are always adverse in interest. Nevertheless, in many cases the interests of a litigant and a third party may be identical. For example, the positions they adopt against the plaintiff may be consistent. They may plan their defences in conjunction. They may even be represented by the same counsel. In those cases, it should not be necessary for a third party to exercise four additional peremptory challenges.

3. Order in which Peremptory Challenges are Made

In addition to these problems, the section does not specify the order in which peremptory challenges should be exercised. In the next section we will discuss in greater detail the tactics involved in jury-vetting. For the moment we merely observe that the tactical value of a peremptory challenge lies in its potential for settling on a jury that is composed of sensible and fair-minded members of the community. It may also be used to remove those jurors unlikely to be sympathetic to a party's cause. Often, considerations which prompt the use of a peremptory challenge are intuitive, or are premised upon popular myths. Housewives, for example, are thought to be unsympathetic to a female plaintiff's allegations of continuing back pain. Some counsel may see age as a factor. A juror who is barely past the age of majority may not have the wisdom or experience to deal with the issues that are likely to be raised.

In many cases, a party who may exercise a peremptory challenge after the other parties have used up their challenges is the one who can make the best use of that challenge. Additionally, the number of peremptory challenges each party is entitled to exercise will affect many tactical considerations. The case may involve one plaintiff and two defendants. If the two defendants are entitled to share only four peremptory challenges, the fairest procedure may be to require the plaintiff to exercise his peremptory challenges first, and for the defendants to exercise theirs in alternating order. If the defendants are each entitled to four peremptory challenges, the imbalance between plaintiff and defendants may be offset by letting the plaintiff exercise his peremptory challenges last.

A member of the judiciary has advised us that the following procedure is usually adopted by trial judges when determining the order in which peremptory challenges should be issued:

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[19] *Johnston* v. *Vancouver General Hospital and Van Louie*, (1974) 1 W.W.R. 239 (B.C.C.A.).

[20] Fraser and Horn, *The Conduct of Civil Litigation*, 1762–1764, n. 56, observe:

> The words "plaintiff" and "defendant" are defined in the *Supreme Court Act*, s. 1. The definition of "plaintiff" does not refer to a defendant issuing a third party notice and the term "defendant" does not refer to a third party defending a third party proceeding. It is questionable whether Rule 22 (6) (b) may be invoked in aid of interpretation of the *Jury Act*, s. 18.

The usual practice in British Columbia is to accord counsel for the plaintiff the first opportunity to exercise a peremptory challenge with respect to the first potential juror, and then to accord the same opportunity to counsel for the defendant. Then, when the next prospective juror is called, the procedure is reversed. The opportunity to exercise a peremptory challenge is then alternated between counsel for the plaintiff and counsel for the defendant until the jury is selected.

The foregoing practice presents no problems when there is one counsel representing the plaintiff or plaintiffs and one counsel representing the defendant or defendants. However, if there is more than one plaintiff separately represented, or more than one defendant separately represented, problems could well arise. The problems would be compounded if there were two or more defendants, some of whom were not represented by counsel. Unless care and ingenuity were exercised by the presiding judge, counsel representing one or more defendants could attempt to exercise all peremptory challenges to which the defendants as a group would be entitled, thereby prejudicing the opportunity of an unrepresented defendant to exercise a peremptory challenge.

C. The Need for Peremptory Challenges

The value of a jury is that it tempers the law with common sense. Common sense is the product of personal experience, and from that experience may develop various prejudices. Theoretically, a jury randomly selected will come to the same decision reached by any other jury randomly selected. That, however, is not always the case. For example, if litigation concerns an assault motivated by racial prejudice on a member of a minority group, conceivably a jury consisting solely of members of that minority group would react differently from a jury which had no such representation. Similarly, a juror who is the wife of a doctor, and a juror who is a member of a religious order that does not believe in medicine, may react differently to evidence adduced in litigation respecting medical malpractice. Eccentricities, idiosyncrasies, personal beliefs and prejudices tend to even out in group decision, but many factors, including the weight one juror's opinion may carry with other jurors, are involved. Challenges are designed to let the parties settle upon an impartial jury.

In many respects peremptory challenges and challenges for cause give only the appearance of justice. In the United States, jury selection may take days, since the parties are entitled to examine prospective jury members, and by that means effectively challenge for cause. In British Columbia, jurors may not be questioned. Challenges for cause must be based upon information gained from outside the courtroom. Usually it is impractical to investigate the array from which jurors will be selected.

To balance practical difficulties that arise when challenging for cause, a limited power to challenge peremptorily gives parties some ability to ensure that the jury will be impartial. It is a small step from using peremptory challenges to arrive at an impartial jury to using them to arrive at a sympathetic jury.

It is, however, difficult to use peremptory challenges to build a sympathetic jury. Little information is available to parties when challenging peremptorily. Various theories have arisen as to jury selection, of which some are reasonable and others border on superstition. For example, one counsel describes his general tactics as follows:[21]

> Personally I proceed on the assumption that since I have to sell a set of facts I would like to sell them to jurymen I like. Generally the people you like, like you. So I use my challenges until I get a jury I like, always challenging first the one I dislike the most, because I might not have enough challenges to get rid of all.

[21] Edson C. Haines, Q.C., "The Jury, The Judge, The Case and You," (1959) L.S.U.C., 175, 193.

More suspect advice is as follows:[22]

> Generally women are inclined to enforce the law as enunciated by the judge, while men are inclined to dilute with common sense the laws they believe outdated or unfair. And it is remarkable how often the presence of one woman on an otherwise male jury has the same effect on their deliberations. In the presence of a woman, men are much more apt to follow the instructions of the court than to introduce their own ideas.

One author[23] cautions against ex-policemen or insurance investigators, because they are accustomed to tearing apart stories and may listen to evidence cynically. Bank clerks, apparently, are notoriously tight-fisted, with unrealistic views respecting appropriate damage awards. Real property owners, car owners and retailers, because of their exposure to liability for negligence, tend to be unsympathetic to victims of another's negligence.

Whether there is substance to any of these approaches is largely irrelevant. Impartiality is crucial to justice, and the parties should have some say in determining whether a jury is impartial. The right to challenge peremptorily goes some way toward preventing a party from complaining later that the jury was "stacked" against him. Challenges are a means of ensuring that justice is seen to be done.

Some commentators argue that rights to peremptory challenges should be divided equally between litigants. In favour of that position it has been said that[24]

> . . . the right of a peremptory challenge is the right to reject and not the right to select and . . . no party to a cause has the right to any particular venireman to try his case. It follows that if one party is allowed more peremptory challenges than the other, he is in effect given an advantage that he may select by indirection particular veniremen to try his cause.

The present approach of section 18 does not ensure that peremptory challenges are divided equally between litigants. Uncertainties that flow from its drafting permit the courts some discretion in determining entitlement to peremptory challenges. No matter how fairly that discretion is exercised it is possible that rights to peremptory challenges will not be equal.

The importance of exact equality of challenges, between either litigants or each side to litigation, may be overstated. Arguably, exact equality of challenges is necessary only for the appearance of justice. One must weigh the value of a peremptory challenge. Studies suggest that there is little variation between juries selected at random, and juries that have been subjected to searching examination.[25] While it is theoretically possible to select a jury which may favour one side over another through the use of peremptory challenges, that could only occur if one side used their challenges with remarkable accuracy while the other side used theirs ineffectually.

In a recent decision, *R.* v. *Piraino*,[26] the accused argued that the prosecutor's greater rights to challenge jurors and the fact that the accused must exercise his challenges first violated sections 7 and 11 (d) of the *Canadian Charter of Rights and Freedoms*, which give every citizen the right to a fair trial. Although this decision arose in a criminal proceeding, the principles discussed apply equally to jury trials in civil matters. O'Leary, J., concluded that inequality of peremptory challenges did not result in unfair trials and did not violate the *Canadian Charter of Rights and Freedoms*. He said:[27]

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[22] *Ibid.*

[23] Bodin, *Civil Litigation and Trial Technique*, (1976) 262–4.

[24] *Williams* v. *Pichard*, (1942) 7 Sc. (2d) 468 (S.C. of Fla. AP. D.).

[25] Hans Zeisel and Sheri Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, (1978) 30 Stan. L.R. 491.

[26] (1982) 67 C.C.C. (2d) 28 (Ont. H.C.).

[27] *Ibid.* at 30-1.

> In my view, so far as the issue before me is concerned, the *Canadian Charter of Rights and Freedoms* gives to every citizen the right to a fair trial. It does not assure him the right that every rule [which] governs that trial, when examined individually, be fair to him. It does, however, assure him that any individual rule that is so unfair that it will result in an unfair trial being had will be struck down.
>
> . . . The peremptory challenge provided for by s. 563 of the *Criminal Code* need only be resorted to when the party challenging has no good reason for believing that the juror is biased. Short of bias, counsel for the Crown or the accused may be suspicious of the views of a particular juror because of his or her age, occupation, appearance, place of residence, dress, nationality, race, religion and numerous other reasons.
>
> To a great extent, the exercise of a peremptory challenge is guesswork. Everyone practising at the Bar quickly hears of a juror that he challenged that would have made a juryman favourable to his case.
>
> There is no doubt that the right given the Crown to challenge four jurors peremptorily and to stand aside 48, while the accused on a rape charge can challenge but 12 jurors peremptorily and the requirement that the accused declare first whether he challenges a juror, gives the Crown an unfair advantage in the jury selection process. This does not mean, however, that there is any danger that the jury chosen will not be independent and impartial.

Equality of challenges may be desirable, but is not necessarily crucial to the fair selection of a jury.

D. Summary

The possibility of various results flowing from the approaches taken by the courts to determining entitlement to peremptory challenges suggests that there will be a lack of certainty in application and a lack of consistency with respect to litigants' rights from case to case. Moreover, resolving these issues will take up valuable court time. There is a need to establish a system for determining entitlement to peremptory challenges that will make the system more certain, achieve fairness and reduce the need for argument concerning procedural matters unrelated to the real issues in dispute.

In the next chapter we will discuss options for reform.

A. Generally

We have concluded that reform of section 18 of the *Jury Act* is desirable. Any reform should attempt to balance the interests of litigants with the need for speedy and efficient administration of justice. We have made the following initial conclusions for reform:

(1) Litigants, so far as possible, should have equal rights with respect to challenging peremptorily prospective jurors. That goal, however, is secondary to the next two considerations.

(2) Reform of rights to peremptory challenges should take into account the expense and practical difficulties, both to litigants and prospective jurors, of summoning a sufficiently large body of citizens from which jurors will be selected.

(3) Entitlement to peremptory challenges should be easily determined and generally not subject to judicial discretion.

Various approaches to these issues have been adopted across Canada, and we will examine these in the next section.

B. Statutory Provisions in Other Jurisdictions

1. Nova Scotia

The approach adopted in Nova Scotia is similar to that taken in British Columbia and Ontario,[1] with one exception. The trial judge has the discretion to permit defendants who are adverse in interest to exercise separate peremptory challenges. Section 14 of the Nova Scotia Act provides in part as follows:[2]

> **Juror Agreement for Verdict**
>
> **14.** (1) Every jury for the trial of a civil matter shall consist of seven persons, of whom five, after deliberating for at least four hours, may return a verdict.
>
> **Peremptory Challenges**
>
> (2) Subject to the rules of the Supreme Court, in a civil matter the plaintiff or plaintiffs on one side and the defendant or defendants on the other side may peremptorily challenge three jurors.
>
> **Peremptory Challenges by Defendants Adverse in Interest**
>
> (3) Notwithstanding subsection (2) but subject to the Rules [rules] of the Supreme Court, where there are defendants who are adverse in interest, the presiding judge may permit each group of defendants who have a common interest to peremptorily challenge three jurors.

It is curious that the judge's discretion may only be exercised in favour of defendants who are adverse in interest. Joint plaintiffs will usually have similar interests, but that is not invariably the case. If judicial discretion in this context is desirable, we can see no justification for restricting that discretion.

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[1] The Ontario section of the *Juries Act*, R.S.O. 1980, c. 226, s. 37, now reads as follows:

> 37. In any cause, the plaintiff or plaintiffs, on one side, and the defendant or defendants, on the other, may challenge peremptorily any four of the jurors drawn to serve on the trial, and such right of challenge extends to the Crown when a party.

The provisions in the Yukon Territories and the Northwest Territories are also similar. The Yukon Territories *Jury Act*, R. Ord. Y.T. 1971, c. J-2, s. 19 (3), provides as follows:

> Each side prosecuting or defending an action may exercise not more than three peremptory challenges which, when exercised, may not be withdrawn.

The Northwest Territories *Jury Act*, R. Ord. N.W.T. 1974, c. J-2, s. 19 (3), is virtually in identical language to the Yukon Territories provision.

[2] R.S.N.S. 1979, c. J-5, s. 14.

In any event, as we observed earlier, entitlement to peremptory challenges should be easily ascertained. We are not convinced that, in the usual case, it is necessary for judges to have discretion to adjust entitlement to peremptory challenges.

2. New Brunswick

Section 28 of the New Brunswick *Jury Act*[3] provides as follows:

> **28.** In every trial of a civil cause or other issue or item as enumerated pursuant to subsection 24 (1), unless peremptory challenge is allowed, the plaintiff and defendant, and, if there is a third party the third party, shall have each the right to challenge peremptorily three of the jurors as they are called, which shall be admitted by the presiding Judge; but this shall not affect any other right of challenge any of the parties has, or, if any of such parties consists of several persons, give a right to such parties to challenge peremptorily more than three of such jurors.

The New Brunswick provision directly addresses the issue of third party rights to peremptory challenges. We agree that a third party should be entitled to exercise peremptory challenges.

It should be observed that New Brunswick restricts the number of challenges that may be exercised by several plaintiffs or defendants and in that regard it is similar to the approach taken in British Columbia, Ontario and Nova Scotia.

3. Prince Edward Island

Section 24 of Prince Edward Island's *Jury Act*[4] provides:

> **24.** (1) At the trial of all civil causes or actions every party may peremptorily challenge four of the jurors or talesmen.
>
> (2) "Party" in this section and in section 32 means a party raising a distinct and severable claim or defence and two or more persons suing or defending jointly shall be deemed to be one party.

Prince Edward Island determines entitlement to challenge peremptorily by reference to whether parties are adverse in interest. Defining entitlement in terms of parties adverse in interest rather than in terms of plaintiffs and defendants ensures that third parties who are adverse in interest to the litigant who has joined them in the action or proceedings may challenge peremptorily.

It makes sense to define entitlement in terms of the interests of the parties. As we observed, the justifying rationale for peremptory challenges is to let the parties take part in arriving at an impartial jury. If co-defendants have identical interests, then it is likely they will be opposed to the same kinds of potential jurors. If their interests are opposed it is unlikely they would prefer the same kinds of potential jurors and in that case they should be entitled to exercise separate peremptory challenges.

While this approach has the appearance of being fair, we suspect it might lead to practical problems. Litigants with common interests may be represented by different counsel. Jury practice, we have observed, is an art, not a science, and tactics employed by counsel differ. Procedural problems may still arise from a requirement that two or more counsel share peremptory challenges where their clients have common interests. Moreover, it is conceivable that a significant portion of court time will be spent by counsel seeking to demonstrate the unique and adverse nature of their clients' interests in order to establish entitlement to four separate peremptory challenges.

Quite apart from these problems, there remains the possibility of multiple plaintiffs and defendants, all of whom are adverse in interest. If each party

[3] S.N.B. 1980, c. J-3.1, s. 28.

[4] R.S.P.E.I. 1974, c. J-5, s. 24.

is entitled to four peremptory challenges, the array of prospective jurors must be immense and numerous problems may arise respecting the order in which challenges must be exercised. The Prince Edward Island approach addresses many of the problems that can arise. Nevertheless, we do not think it answers all of those problems satisfactorily and, accordingly, we do not favour it.

4. Canadian Criminal Code

Refinement is added to the challenging of prospective jurors in criminal matters. An accused is entitled to challenge peremptorily; the number of peremptory challenges he may exercise is determined by the seriousness of the offence charged.[5]

On the other hand, however many peremptory challenges an accused is entitled to, a prosecutor may exercise only four peremptory challenges. However, in addition to his peremptory challenges a prosecutor may, in all cases other than libel,[6] direct that a juror stand by.[7]

The effect of a direction to "stand by" is that the prosecutor may wait to exercise his peremptory challenges. It imports a power to select sympathetic jurors by letting the prosecutor see as many of them as he likes before deciding to exercise his challenges. If the array is exhausted before a jury is selected, then those jurors who were asked to stand by are called again. This time, unless challenged, they will become members of the jury.

Parties in a civil action may not direct jurors to stand by. That power, however, might solve many of the problems that arise with respect to peremptory challenges. Currently, a party must accept a juror or challenge. He may not particularly like the juror, but he may suspect worse candidates will present themselves. If he uses his challenges early on against jurors of whom he is uncertain, he will be unable to challenge later jurors who are clearly opposed to his interests unless they are so clearly adverse that they may be challenged for cause. The power to direct jurors to stand by would resolve many of these concerns and make a limited number of peremptory challenges more effective tools for jury selection. Moreover, by maintaining limited peremptory challenges, there is no need to call a larger array of jurors. That is an efficient result both in terms of the potential costs of jury trials and convenience to the public from whom jurors are selected.

It should be observed that the Law Reform Commission of Canada has recommended that "stand asides" should be abolished. Instead, the prosecutor may exercise the same number of peremptory challenges as the accused. Their justification for that conclusion is as follows:[8]

> If the prosecutor is given the same number of peremptory challenges as the accused there would appear to be no reason to continue to allow the prosecutor to stand aside prospective jurors.

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[5] *C.C.C.*, s. 562: for high treason or first degree murder an accused may challenge twenty jurors peremptorily; for an offence involving imprisonment for more than five years, he may challenge twelve jurors peremptorily; in all other cases he may challenge four jurors peremptorily. Even if there are multiple accused, that does not affect their rights to challenge peremptorily: s. 565.

[6] *C.C.C.*, s. 566.

[7] Before the enactment of *An Ordinance for Inquests*, 4 Stat. 33 Ed. 1, re-enacted by 6 Geo. 4, c. 50, s. 29, the Crown assumed "either by prerogative or by usurpation" an unlimited right to peremptory challenges. That right was often abused. The Crown, if it did not wish an inquest to take place, would continue to challenge jurors until not enough remained to make a jury, indefinitely postponing the trial to the oppression of the subject. The enactment of *An Ordinance for Inquests* permitted the Crown to continue to challenge without cause an unlimited number of jurors. But if the array was exhausted before a jury was selected, the names of all jurors peremptorily challenged by the Crown were called again "to put the Crown to assign cause, so that, if twelve of those upon the panel remain as to whom no just cause of objection can be assigned, the trial may proceed": *see Mansell* v. *R.*, (1857) 8 El. & Bl. 54, 8 E.R. 20, at 27; this was the origin of the modern practice permitting prosecutors to direct prospective jurors to stand by. In *Mansell* v. *R.*, counsel suggested the following origin for the term stand by (at 36):

> The words seem to have been imported from the Irish law; the practice of ordering "a juror to stand by until the panel shall be gone through, at the prayer of them that prosecute for the king," is preserved to the Irish Courts by stat. 9 G. 4, c. 54, s. 9.

[8] "The Jury," Report no. 16, 47.

It appears to be implicit in the federal Commission's recommendation that rights with respect to selecting a jury should be evenly balanced between the accused and the Crown. The federal Commission concluded that that balance could be struck by matching rights to peremptory challenges. In the context of civil juries we are opposed to that approach since it would necessarily entail calling greater numbers of prospective jurors where there are several parties on one side. In any event the balance between litigants' rights would be preserved by granting to all parties the power to stand aside a juror.

We think that limiting each side to four peremptory challenges but providing that both sides should also be empowered to direct jurors to stand by is an intriguing approach to resolving these problems. Nevertheless, we have concluded that this approach should not be adopted. First, although this method was fully described in the Working Paper, none of our correspondents suggested it should be adopted. Second, there is no evidence that the introduction of this novel power would achieve the ends we seek. Although the stand by appears to work well in criminal proceedings, there is no guarantee it will be equally successful in civil cases. Our concern throughout has been to resolve problems arising when multiple parties are involved in a proceeding. That the stand by is effective when used by a prosecutor is not evidence that it will be effective when used by several parties in a civil jury trial.

It is conceivable, for example, that such a power would be abused, so that virtually every juror could be directed to stand by. That would only have the effect of delaying jury selection. It could be argued that counsel would be unwise to use such a power indiscriminately since jurors might resent being directed to stand by. It is thought, for example, that jurors resent being challenged for cause. If counsel is unable to establish cause against a juror, it is usually considered wise to exercise a peremptory challenge, since that juror is likely to be disposed against him. These are matters of supposition. They cannot be proved.

5. Saskatchewan

We referred to Saskatchewan legislation earlier. That legislation was revised in 1981 to reduce the number of challenges to which each litigant is entitled from four to two. One likely reason for that revision was that the cost in terms of administrative efficiency and the inconvenience to prospective jurors summoned who will not serve could not be justified. Under the former approach, in an action involving several plaintiffs and several defendants, the number of peremptory challenges available necessarily required that a large array of prospective jurors be summoned. Another possible reason for the revision is that the more limited entitlement to peremptory challenges was the result of reducing the number of jurors on a civil jury from twelve to six.[9]

The revised section of the Saskatchewan *Jury Act*[10] provides:

> **26.** Each party to an action has the right to exercise two peremptory challenges.

Providing that each party is entitled to a fixed number of peremptory challenges resolves many of the problems we have identified that arise with respect to peremptory challenges.

A similar approach is taken in Newfoundland,[11] Manitoba[12] and Alberta.[13] In Alberta, each party was formerly entitled to six peremptory challenges.[14] That entitlement has now been reduced to three.[15]

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[9] *See* Law Reform Commission of Saskatchewan, *Tentative Proposals for Reform of the Jury Act*, 1979, at 8.

[10] *The Jury Act, 1981*, S.S. 1981, c. J-4.1, s. 26.

[11] *The Jury Act*, S. Nfld. 1980, c. 41, s. 26.

[12] *The Juries Act*, R.S.M. 1970, c. J30, s. 76.

[13] *The Jury Act*, S.A. 1982, c.J-2.1, s. 11.

[14] *The Jury Act*, R.S.A. 1980, c. J-2, s. 27.

[15] *Supra*, n. 13.

While we favour a system of separate entitlement to a fixed number of peremptory challenges, this approach does not necessarily address the problems of third party entitlement, equality of challenges, or keeping down the numbers of prospective jurors which must be summoned.

C. Recommendations

1. Entitlement

In the Working Paper we concluded that a perfect system for determining entitlement could not be devised. For that matter, it was our opinion that a "perfect" system was not necessary to accomplish our principal goal, namely: to recommend a system for determining entitlement that is fair, certain, and does not require empanelling a large array of jurors.

In our Working Paper, we tentatively proposed that, if multiple parties were involved on one or both sides, each of those multiple parties should be entitled to two peremptory challenges. If there was only one party on one side, he should be entitled to four challenges. The goal of keeping the array of jurors down was answered in part by reducing each litigant's entitlement to peremptory challenges from four to two.

This approach resolved all problems with the exception of equality of challenges between the sides. For example, if one plaintiff faces four defendants, the plaintiff's entitlement to four peremptory challenges will not balance the defendants' collective eight challenges. Earlier we concluded that that issue was not crucial. The imbalance between entitlement to peremptory challenges will not ordinarily result in unfairness between the parties since, on a practical level, they are difficult to use to gain any real advantage. Moreover, one reason for our conclusion that multiple parties should be entitled to separate challenges was that counsel would not be able to agree upon the use of shared challenges. In that respect, a plaintiff who is able to exercise four separate peremptory challenges is theoretically in a stronger position with respect to each defendant who is only entitled to exercise two peremptory challenges.

The majority of responses we received supported this proposal, and the Commission has concluded that it should be adopted. Criticism of the proposal rested solely on the utility of peremptory challenges generally. That issue is discussed in greater detail in the next chapter.

The Commission recommends:

1. Each party should be entitled to four peremptory challenges, unless there are two or more parties on a side, and in that case, each of the parties on that side, whether their interests are common or adverse, should be entitled to two peremptory challenges, to be exercised separately.

[Note: This recommendation is subject to Recommendation 7.]

2. Third Parties

In our Working Paper we proposed:

> **2.** For the purposes of Proposal 1, a third party, other than one who is already a party to the action, should be considered as a party on the same side as the party which has joined him to the litigation.

Our correspondents agreed that section 18 of the *Jury Act* should provide that third parties are to be considered as parties to the side that has joined them. In that way a third party will be entitled to two peremptory challenges. The defendant who has joined the third party will also be entitled to only two peremptory challenges.

In the context of civil litigation, "third party" is a term of art used to describe someone against whom the defendant asserts a claim over, with respect to the matters in dispute between the plaintiff and the defendant. For example, a person injured by an exploding toaster may sue the store that sold it to him. The store may join the manufacturer of the toaster as a third party to the proceedings. If the accident was the result of faulty workmanship and the plaintiff is successful against the defendant store the store will have a claim against the manufacturer. The third party procedure allows these matters to be resolved in one proceeding.

The term "third party" is also commonly used to mean someone other than the persons directly involved in a contract, arrangement or dealing. For example, in insurance policies a third party is anyone other than the insured, insurer or beneficiary of the policy. For the purposes of our recommendations, "third party" should have the meaning it has been assigned in Rule 22 (1) of the Supreme Court Rules: a person, whether or not a party to the action, whom a defendant joins to the action, and against whom the defendant alleges entitlement to contribution, indemnity or other relief, or who is otherwise involved with the issues in dispute. However, if a plaintiff is made a third party by a defendant (a rare occurrence, since the defendant would usually counterclaim against that plaintiff or allege a right of set-off), he should not be entitled to additional challenges.

Two of our correspondents observed that the proposal might not include statutory third parties. Under the *Insurance Act*[16] and under the *Insurance (Motor Vehicle) Act*,[17] insurers who dispute liability under a defendant's insurance policy are entitled to take part in the proceedings and to be treated for all purposes as if they were defendants in the action. It is possible that, since for all purposes a statutory third party is to be treated as a defendant in the action, entitlement to peremptory challenges follows. Nevertheless, it is desirable to avoid any ambiguities. Legislation should confirm that a statutory third party is entitled to challenge peremptorily.

We received one submission which urged that, in these circumstances, the insurer should be entitled to as many challenges as the plaintiff, because where the insurer disputes liability under the defendant's insurance policy, it is adverse in interest to both the defendant and the plaintiff. We are not persuaded by this argument. The dispute between the insurer and the defendant will not be put before the jury, but resolved in subsequent litigation. In the case to be heard by the jury selected, the insurer and the defendant are not adverse in interest. There is no reason to increase the number of peremptory challenges the insurer may exercise.

The Commission recommends:

2. *(a) For the purposes of Recommendation 1, a third party, other than one who is already a party to the proceeding, should be considered as a party on the same side as the party who claims rights over against the third party.*

   (b) "Third party" should also include a person who asserts third party status under section 254 of the Insurance Act, R.S.B.C. 1979, c. 200, and section 20 (7) of the *Insurance (Motor Vehicle) Act,* R.S.B.C. 1979, c. 204, *and should be deemed to be a party on the same side as the insured.*

The following examples demonstrate how Recommendations 1 and 2 should function:

[16] R.S.B.C. 1979, c. 200, s. 254.
[17] R.S.B.C. 1979, c. 204, s. 20 (7).

EXAMPLE 1

A commences an action against B. When selecting a jury, under the current law and under our recommendations, A and B are each entitled to exercise four peremptory challenges.

EXAMPLE 2

A commences an action against B. B adds C to the action as a third party. Under the current law, A and B are each entitled to exercise four peremptory challenges. C's entitlement to challenge peremptorily is in doubt. Under our recommendations, C would be considered a party on the same side as B. A would still be entitled to exercise four peremptory challenges. B and C would each be entitled to two peremptory challenges.

EXAMPLE 3

A, B and C jointly commence an action against D, E and F. Under the current law it is likely that A, B and C will share four peremptory challenges, as will D, E and F. Under our recommendations, each party would be entitled to exercise two peremptory challenges.

EXAMPLE 4

A commences an action against C. C is insured by D, but D disputes liability. D joins itself to the action. Under the current law, and under our recommendations, A is entitled to four peremptory challenges. Under the current law, D's entitlement is in doubt. Under our recommendations, D would be entitled to two peremptory challenges, as would C.

3. JUDICIAL DISCRETION

In our Working Paper we also proposed that section 18 of the *Jury Act* should be revised to permit the trial judge to determine the order in which peremptory challenges must be issued. That decision will depend upon how many litigants are on each side and whether or not litigants on one side are adverse in interest. None of our correspondents raised any objections to that proposal and, upon further consideration, the Commission has concluded that legislation to that effect should be implemented to confirm the trial judge's discretion.

If there is only one plaintiff and one defendant, then the usual practice is to alternate the order in which peremptory challenges are exercised between them: plaintiff, defendant; defendant, plaintiff; and so on. That approach is not satisfactory if the sides are entitled to unequal numbers of peremptory challenges. If the plaintiffs are entitled to a total of six challenges, and the defendants are entitled to a total of fourteen, then perhaps the fairest approach is to require the defendants to exercise their peremptory challenges first. This is a matter which the trial judge should have discretion to resolve in the circumstances of the case.

The Commission recommends:

3. Legislation be enacted to provide that a judge presiding at a proceeding has a discretion to direct the order in which peremptory challenges shall be exercised.

4. Refinements

(a) *Limit on Peremptory Challenges*

In the Working Paper we also invited comment on whether additional refinements might be desirable. For example, to prevent having to call a very large array of jurors when many litigants are involved, an upper limit might be placed on the total number of challenges available. If entitlement exceeds that upper limit, the trial judge would have discretion to allot peremptory challenges.

Those who responded on this issue concluded that a ceiling should be placed on the number of peremptory challenges that may be exercised. Any limit would be arbitrarily chosen. We have concluded that the parties should be entitled to no more than a total of 20 peremptory challenges. For example, if in an action there is one plaintiff and 12 defendants, without a limit the plaintiff would be entitled to four peremptory challenges and the defendants would be entitled to two peremptory challenges each, totalling 28. By providing that the total number of peremptory challenges that may be exercised by both sides may not exceed 20, the trial judge must then determine how to divide 20 challenges among the parties. Perhaps, in the circumstances, it would be fair to allow the plaintiff four peremptory challenges, and each defendant one peremptory challenge. The remaining four might be used by the defendants by majority agreement.

The problem of dividing challenges among the parties will seldom arise, because seldom will the maximum of 20 be reached. Nevertheless, the judge could be faced with virtually insoluble problems if the challenges cannot be fairly or evenly divided among the parties. For this reason, we have concluded that the judge should have the discretion to allot a number of challenges which, in total, is less than 20. That would solve the problem of dividing the challenges posed in the last example, as well as most problems that might arise.

It may happen, however, that there are more parties than challenges. For example, the action may be between three plaintiffs and 18 defendants. It would not be an easy matter to divide 20 challenges among the parties. Perhaps each plaintiff should be entitled to two challenges.That would leave 14 challenges to be divided among the defendants. Unless the judge were permitted to exceed the maximum of 20 peremptory challenges, some scheme of shared challenges would have to be adopted. We have concluded that in these rare cases, due to the exceptional circumstances, the judge should have discretion to allot a total of peremptory challenges that exceeds 20. But in no case should a party be allotted more peremptory challenges than he would have had if the maximum of 20 had not been reached.

The most telling argument in favour of a maximum number of peremptory challenges (subject to limited judicial discretion to vary) is that it keeps down the costs of summoning prospective jurors. We are advised that the current practice is now to summon 18 jurors. The cost of summoning 18 jurors is $750. If counsel requests a larger panel, the cost is $75 for each additional five persons. By limiting to 20 the total of peremptory challenges that may be exercised in a proceeding, the maximum panel that need be summoned would be 28. The additional cost would be $150, and that will only occur in exceptional cases. We are informed that one or two persons will invariably be excused for previously unrevealed medical reasons. Taking that into account, the sheriff should probably summon an additional two people. In that case, the maximum number of persons summoned would be 30, representing an increase in costs of $180 over those currently incurred for empanelling a jury. It

is unusual in jury trials to have more than one or two parties on a side. Consequently, in most cases there will be no increase in the costs of empanelling a jury.

The Commission recommends:

4. Subject to Recommendation 5 (b), the total number of peremptory challenges that may be exercised by all parties should not exceed 20.

5. (a) If the maximum of 20 peremptory challenges is reached, the judge presiding at the proceeding should have discretion to determine entitlement to peremptory challenges, but in no case may a party exercise a number of peremptory challenges greater than if the maximum of 20 had not been reached.

(b) If the 20 peremptory challenges can not be divided fairly between the sides, and equally between the parties on one side, the judge may, for that purpose, allot a total of peremptory challenges which is less than or, in exceptional circumstances, greater than 20.

(b) *Pre-Trial Conference*

Entitlement to peremptory challenges and the order in which they are to be exercised are issues which could usefully be resolved at a pre-trial conference. Rule 35 (3) of the Supreme Court Rules lists the matters that are to be considered at a pre-trial conference:

> **Agenda of Pre-trial Conference**
>
> (3) A pre-trial conference shall be attended by the solicitors for the parties, or the parties themselves, and shall consider
>
> (a) the simplification of the issues,
>
> (b) the necessity or desirability of amendments to pleadings,
>
> (c) the possibility of obtaining admissions which might facilitate the trial,
>
> (d) the quantum of damages,
>
> (e) fixing a date for the trial, and
>
> (f) any other matters that may aid in the disposition of the action or the attainment of justice.

The advantage of resolving entitlement to peremptory challenges at a pre-trial conference is that the sheriff will know exactly how many jurors to summon. That is of importance where the total of peremptory challenges reaches 20, so that entitlement becomes discretionary. For this reason, we think the judge who presides at a pre-trial conference should have the same jurisdiction to resolve entitlement to peremptory challenges as we have recommended for the judge who presides at the proceeding. Usually this will involve only a determination of the order in which peremptory challenges are to be exercised. In the rare case where the total of peremptory challenges reaches 20, permitting a judge at a pre-trial conference to resolve entitlement to peremptory challenges will ensure that there is no doubt concerning how many prospective jurors should be summoned by the sheriff.

An order made at a pre-trial conference may be modified at trial, under Rule 35 (4). The trial judge has jurisdiction to vary the order as may be appropriate in the circumstances, to avoid injustice.

The Commission recommends:

6. Entitlement to peremptory challenges, and the order in which they are to be exercised, may be determined at a pre-trial conference.

(c) *Where One Counsel Represents Two or More Parties*

In the Working Paper we also asked for comment on whether, if one or more parties are represented by the same counsel, they might be required to

share challenges. Problems might arise, for example, where a partnership is sued. Each partner would be entitled to two challenges and yet, presumably, their interests would be identical. If they are represented by one counsel this approach would restrict their challenges. If individual partners are represented by separate counsel, that suggests that their interests are not identical and they should be entitled to separate challenges. One of our correspondents wrote:

> . . . it seems to me that if one counsel is representing more than one party, it would be highly unlikely that the position could be taken that there was prejudice . . .

We agree. If one counsel represents two or more parties, it is likely that there is a mutuality of interest. In that case, they would be opposed to the same kinds of jurors and there would be no need for increased entitlement to peremptory challenges. Moreover, this approach will tend to resolve another problem which may arise where one person wears several "hats" in the litigation. For example, some people carry on business behind several closely held (and interlocked) corporate entities. The plaintiff may find himself suing several legal entities, all of whom are really the same person. It would be unfair if each legal entity was entitled to separate challenges. In that kind of case, usually they will be represented by the same counsel, and this approach prevents injustice from occurring.

The Commission recommends:

7. For the purposes of Recommendation 1, where the same counsel represents two or more parties, entitlement to peremptory challenges with respect to such parties should be determined as if they were one party.

(d) *Actions Which are Consolidated or Heard at the Same Time*

Under the Supreme Court Rules, the court may order that separate proceedings be consolidated or heard at the same time:

> **Consolidation**
>
> 5. (8) Proceedings may be consolidated at any time by order of the Court or may be ordered to be tried at the same time or on the same day.

An order for consolidation of proceedings, or an order that they be heard at the same time, is usually made where, for example, the proceedings concern the same incident. Such an order avoids multiple proceedings, so that the result is often convenience, efficiency, and lower costs. Consolidation is appropriate where it is anticipated that similar questions of law and of fact will arise and similar evidence will be led. It is inappropriate where the claims raised are incompatible, different modes of trial are set for the proceedings, or in any case where it can be established that consolidation would be prejudicial to one or more of the litigants involved.

Consolidation is a matter of procedure only. The actions, it would appear, remain separate.[18] Conduct of the consolidated proceedings is in the discretion of the trial judge who must determine, for example, whether the actions are heard at the same time or one after the other, and in what order examination-in-chief and cross-examination should take place.

One correspondent suggested that legislation should address entitlement to peremptory challenges where it has been ordered that actions be consolidated or heard at the same time. Should entitlement be determined before or after the actions are joined for the purposes of trial? In general, parties should not be deprived of rights they would have enjoyed had the proceedings taken place separately. Nevertheless, the purpose of consolidating proceedings or

[18] *Mah* v. *Mamalyga*, (1966) 57 W.W.R. 117; *Kirk* v. *Rivers Realty Ltd.*, (1964) 47 W.W.R. 700 (Co. Ct.).

ordering that they be tried at the same time, is, in addition to convenience and justice, to save time and reduce the costs borne by the parties.[19] Moreover, the policy in favour of avoiding inconvenience to the public, in terms of the number of prospective jurors which must be called, suggests that when separate proceedings are heard at the same time, entitlement should be determined as if they were one proceeding. While that already appears to be the current practice,[20] we have concluded that it should be confirmed by legislation.

We think it unlikely that this approach to determining entitlement to peremptory challenges will have any effect on the desirability of consolidating actions. First, it is important not to overrate the value of peremptory challenges. If consolidation is otherwise desirable, counsel will not oppose it because the effect will be to reduce his entitlement to challenge peremptorily. Moreover, courts are unlikely to find convincing an argument opposing consolidation based on prejudice resulting from reduced entitlement to peremptory challenges.

The Commission recommends:

8. Where separate proceedings are consolidated or ordered to be heard at the same time before the same jury, entitlement to peremptory challenges should be determined as if the parties to the proceedings were parties to one proceeding.

Consolidation, or an order that proceedings be heard at the same time, does not necessarily mean that they will be tried before the same jury. The trial judge, for example, may decide to hear the proceedings one after the other on the same day.

Our recommendation does not address the situation of proceedings which are heard successively. If different juries hear the separate proceedings, no problem of entitlement arises from consolidation. If the same jury hears the proceedings in succession, then, probably, entitlement should be determined as if it were all the same proceeding, but we leave that matter to the trial judge's discretion.

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[19] *See, e.g., Gay Co. Ltd. v. Trick*, [1927] 1 D.L.R. 1091 (Ont. C.A.).

[20] *Kirk v. Rivers Realty Ltd.*, (1964) 47 W.W.R. 700 (Co. Ct.).

A. The Scope of the Report

Our work on peremptory challenges was limited to resolving various procedural questions that had arisen concerning entitlement to their use. The Working Paper which preceded this Report was confined to those questions, and we have adhered to that approach in this Report.

Several of our correspondents raised issues of a broader nature. It was urged, for example, that various questions arising from challenges for cause should be addressed. Some of our correspondents urged that peremptory challenges should be abolished. Others suggested that the utility of peremptory challenges could be enhanced by providing counsel with additional information about prospective jurors.

Various methods for providing counsel with additional information about prospective jurors were suggested. For example, lists of names of persons called for jury duty are not usually available until a day or two before trial. If counsel were given those lists a week or more prior to trial, they would have an opportunity to make inquiries which might indicate bias. One response suggested that greater care might be employed listing the occupations of jurors. Apparently, that information is frequently inadequate or misleading. Another suggested that jurors might be required to answer a set of standard questions. Another correspondent expressed strong support for the American system, which permits extensive cross-examination of prospective jurors in order to determine whether they may be challenged for cause. The information gained from that procedure may often allow counsel to exercise his peremptory challenges with some accuracy.

As we mentioned, these responses addressed issues which were not raised in the Working Paper. Our sole concern was to clarify procedural questions which appeared to have caused uncertainty. Perhaps a subsequent project might be considered, devoted to improving the utility of peremptory challenges (or considering their abolition, as some suggested). It is inappropriate, however, to consider these issues in this Report, since the Working Paper which canvassed the views of the bar did not raise them. Moreover, there was no consensus among our correspondents who raised these issues. Whether peremptory challenges should be abolished, or their utility enhanced, is a question with no obvious answer and one which would probably require a good deal more study in the context of jury use generally.

B. List of Recommendations

We have made a number of recommendations for reform in this Report. Entitlement to peremptory challenges is currently governed by section 18 of the *Jury Act*. In order to implement the reform recommended, section 18 must be repealed and a new section enacted in its place. That new section should implement the following recommendations for reform:

1. Each party should be entitled to four peremptory challenges, unless there are two or more parties on a side, and in that case, each of the parties on that side, whether their interests are common or adverse, should be entitled to two peremptory challenges, to be exercised separately.

[NOTE: This recommendation is subject to Recommendation 7.] *(Page 13)*

2. (a) *For the purposes of Recommendation 1, a third party, other than one who is already a party to the proceeding, should be considered as a party on the same side as the party who claims rights over against the third party.*

(b) *"Third party" should also include a person who asserts third party status under section 254 of the* Insurance Act, *R.S.B.C. 1979, c. 200, and section 20 (7) of the* Insurance (Motor Vehicle) Act, *R.S.B.C. 1979, c. 204, and should be deemed to be a party on the same side as the insured. (Page 14)*

3. Legislation be enacted to provide that a judge presiding at a proceeding has a discretion to direct the order in which peremptory challenges shall be exercised. (Page 15)

4. Subject to Recommendation 5 (b), the total number of peremptory challenges that may be exercised by all parties should not exceed 20. (Page 17)

5. (a) *If the maximum of 20 peremptory challenges is reached, the judge presiding at the proceeding should have discretion to determine entitlement to peremptory challenges, but in no case may a party exercise a number of peremptory challenges greater than if the maximum of 20 had not been reached.*

(b) *If the 20 peremptory challenges can not be divided fairly between the sides, and equally between the parties on one side, the judge may, for that purpose, allot a total of peremptory challenges which is less than or, in exceptional circumstances, greater than 20. (Page 17)*

6. Entitlement to peremptory challenges, and the order in which they are to be exercised, may be determined at a pre-trial conference. (Page 17)

7. For the purposes of Recommendation 1, where the same counsel represents two or more parties, entitlement to peremptory challenges with respect to such parties should be determined as if they were one party. (Page 18)

8. Where separate proceedings are consolidated or ordered to be heard at the same time before the same jury, entitlement to peremptory challenges should be determined as if the parties to the proceedings were parties to one proceeding. (Page 19)

B. Acknowledgments

While this has not been a major project, in terms of the Commission resources devoted to it, the volume of response which our Working Paper attracted suggests that it identified an area in which clarification and reform are called for. We wish to thank all those who took the time to consider the Working Paper and to write to us.

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